1997

Execusoft, Inc. v. Intraspace Corporation, Inc. : Execusoft, Inc. v. Pleiades Software Developement, Inc. : Brief of Appellant

Utah Court of Appeals

Duane R. Smith; Attorney for Appellant.
Stephen B. Elggren; Bob W. Dadley; Elgren & Van Dyke; Harry Caston; McKay, Burton & Thurman; Attorneys for Appellees.
Duane R. Smith DUANE R. SMITH, P.C. Attorney for Appellant Intraspace 4885 South 900 East, #208 Salt Lake City, Utah 84117 Telephone No.: (801) 261-4626
Stephen B. Elggren ELGGREN & VAN DYKE Attorney for Appellee Execusoft 2469 East Fort Union Blvd., #202 Salt Lake City, Utah 84121 i"~ Telephone No.: (801)942-3600
Harry Caston MCKAY, BURTON & THURMAN Attorney for Appellee Pleiades Software Development 10 E. South Temple, #600 Salt Lake City, Utah 84133 Telephone No.: (801) 521-4135

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

EXECUSOFT, INC.,

Plaintiff/Appellee,

vs.

INTRASPACE CORPORATION, INC., a Utah corporation,

Defendant/Appellant.

970395-CA
Case No. ~~970166~~-CA

Priority No. 15

EXECUSOFT, INC.,

Third Party Plaintiff,

vs.

PLEIADES SOFTWARE DEVELOPMENT, INC.,

Third Party Defendant.

BRIEF OF APPELLANT, INTRASPACE CORPORATION, INC.

APPEAL FROM THE JUDGMENT
GRANTED BY THE SECOND JUDICIAL DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH,
THE HONORABLE RODNEY S. PAGE PRESIDING

Duane R. Smith
DUANE R. SMITH, P.C.
Attorney for Appellant Intraspace
4885 South 900 East, #208
Salt Lake City, Utah 84117
Telephone No.: (801) 261-4626

Stephen B. Elggren
ELGGREN & VAN DYKE
Attorney for Appellee Execusoft
2469 East Fort Union Blvd., #202
Salt Lake City, Utah 84121
Telephone No.: (801) 942-3600

See inside for continuation of opposing counsel

Harry Caston
MCKAY, BURTON & THURMAN
Attorney for Appellee Pleiades Software Development
10 E. South Temple, #600
Salt Lake City, Utah 84133
Telephone No.: (801) 521-4135

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

EXECUSOFT, INC. Plaintiff/Appellee, vs. INTRASPACE CORPORATION, INC., a Utah corporation, Defendant/Appellant.	:	Case No. 970166-CA
EXECUSOFT, INC., Third Party Plaintiff, vs. PLEIADES SOFTWARE DEVELOPMENT, INC., Third Party Defendant.	:	

BRIEF OF APPELLANT, INTRASPACE CORPORATION, INC.

APPEAL FROM THE JUDGMENT
GRANTED BY THE SECOND JUDICIAL DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH,
THE HONORABLE RODNEY S. PAGE PRESIDING

TABLE OF CONTENTS

No addendum is necessary

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF JURISDICTION

The Court has jurisdiction of this appeal pursuant to §78-2-2(3)(j) Utah Code Ann.

ISSUES PRESENTED FOR REVIEW

A. Issues Presented.

1. Did the trial court err in dismissing the counterclaims of Intraspace?

2. Did the trial err in ruling, as a matter of law, that Execusoft was not obligated to return the source code and the IAC8 to Intraspace?

3. Did the trial court err, as a matter of law, in ruling that Intraspace had failed to mitigate its damages?

4. Is Intraspace entitled to judgment for the failure of Execusoft to return the source code and the IAC8, and if so, in what amount?

B. Standard of Review.

The trial court ruled, as a matter of law, and not as a matter of fact, that the counterclaims of Intraspace should be dismissed and that Intraspace was not entitled to damages as a result of the failure of Execusoft to return the source code or the IAC8. Questions of law are reviewed by this Court for correctness. See, *State v. Larson*, 865 P.2d 1355 (Utah 1993); *Lunnen v. Utah Dept. of Transportation*, 886 P.2d 70 (Utah App.1994).

DETERMINATIVE STATUTES AND RULES

No statutes or court rules determine the outcome of this action as the claims are all based on the common law.

STATEMENT OF THE CASE

A. Nature of the Case.

In this action, Execusoft sued for payment for services rendered to Intraspace. Intraspace counterclaimed for damages and breach of contract. The matter was tried before the trial court over a period of several days. The trial court ruled that Execusoft was entitled to recover for its services rendered. The court entered judgment in accordance with the claim of Execusoft. However, the trial court dismissed the counterclaims of Intraspace and failed to enter judgment for an offset in favor of Intraspace.

B. Course of Proceedings.

Following the trial and the ruling of the trial court, Execusoft proposed Findings of Fact, Conclusions of Law and Judgment. Intraspace objected to the same and filed a timely motion to amend. The trial court, upon hearing, granted the motion to amend in part. Accordingly, the trial court entered amended Findings of Fact, Conclusions of Law and Judgment. However, through inadvertence, an order on the motion to amend was never entered. This error was brought to the attention of the parties by a *sua sponte* motion of the Court of Appeals. The error was corrected by the entry of an appropriate order on motion to amend. This appeal follows, in a timely fashion, the entry of the order on the motion to amend.

C. Statement of Facts.

Intraspace is a local business involved primarily in satellite design and manufacturing and computer programming services. (R.982). In 1992, Intraspace entered into a contract with the Royal Norwegian Air Force ("RNAF") for the design of a

computer system to be used in conjunction with the RNAF's air traffic control system. (R.812). In order to accomplish this work, Intraspace needed the assistance of computer programmers who were familiar with certain computer programs and program languages. (R.814).

Execusoft, Inc. ("Execusoft") is a company that provides computer programming services to its clients. (R.611). Execusoft contacted Intraspace and indicated that it could provide to Intraspace the computer programmers necessary to perform the work for the RNAF. (R.561). In order to accomplish this, Execusoft contacted the third party defendant Pleiades Software Development, Inc. ("PSD") and obtained the services of the principals of that company, Sue Dintleman and Tim Maness. (R.562-63). In the trial transcript, these programmers are referred to simply as "Sue" and "Tim".

In January of 1994, Execusoft and Intraspace entered into the first contract for services. (R.564). Pursuant to that contract, Intraspace was to pay Execusoft the rate of $50.00 an hour for work performed by Tim and Sue. The contract specifically provided that payment would be due only upon approval of time sheets by Intraspace and that the work product developed through the programming efforts of Tim and Sue would belong to Intraspace. (Exh.2;R.216).

The first contract between Execusoft and Intraspace was terminated approximately the end of April of 1994. (R.616). At the time, Execusoft claimed that Intraspace owed monies that had not been paid and that, therefore, the contract had been breached. In early May, 1994, the parties discussed a new arrangement. Execusoft entered into a new agreement with PSD whereby the hourly rate was increased from $50.00 to $55.00 per hour but that it was agreed that PSD would be paid only upon

receipt of monies from Intraspace. (Exh.3; R.617, 716). Intraspace disputed that it had entered into a new contract with Execusoft, believing that it had entered into a direct contract with Tim and Sue to continue the work on the RNAF contract. Whatever the agreement, Tim and Sue continued to work with Intraspace, which included on-site work in Norway during the month of June, 1994.

During the process of performance of the RNAF contract, Intraspace, with the assistance of Tim and Sue, developed an important product known as a "source code". (R.197, 832-33). This source code is, for all intents and purposes, the key to the operation of the program developed for the RNAF. The source code did not belong to the RNAF but was intended to be sold to the Norwegians when the project was finished. (R.832). Without the source code, any problems in the system, as well as modifications to the system, could not be made or remedied. (R.731, 832, 850).

In addition, in order to perform for the RNAF, a piece of equipment known as an "IAC8" was loaned to Intraspace by Data General Corporation. (R.911). This item was used by Intraspace and Tim and Sue in Norway.

When the work was completed in Norway, the source code and the IAC8 were taken by Tim and Sue and retained in their possession. (R.747-48). Tim and Sue refused subsequent demands for the return of the source code and the IAC8. Without the source code, Intraspace has been unable to debug the system for the Norwegians and has been placed at risk of litigation with the RNAF. (R.909). In addition, because Tim and Sue did not return the IAC8, Intraspace is liable to Data General Corporation for the full value of that item. (R.911).

Intraspace filed a counterclaim for damages due to the failure of Execusoft to return the source code and the IAC8. As of the date of this appeal, both items are still in the possession of Tim and Sue, the agents of Execusoft.

The trial court entered judgments in favor of Execusoft and PSD. However, the trial court dismissed the counterclaims of Intraspace. The trial court's reasoning was that Execusoft, and/or Tim and Sue, had no obligation to return the source code or the IAC8 to Intraspace and that Intraspace had failed to mitigate its damages. It is from the ruling dismissing the counterclaims that Intraspace brings this appeal.

SUMMARY OF ARGUMENT

The Notice of Appeal and the Docketing Statement prepared by Intraspace set out four separate issues for appeal. In reality, those four separate issues revolve around a single question: Did the trial court commit reversible error by ruling, as a matter of law, that Execusoft had no obligation to return the property of Intraspace in the form of the "source code" and a piece of computer equipment known as an IAC8? The specific conclusion of law is paragraph 6, which states:

> Because of the failure of Defendant to make the payments required under the contract, Plaintiff, Tim and Sue had no obligation to return neither the source code nor the IAC8.

(R. 490) This conclusion of law is clearly erroneous and must be reversed. It is apparent that this conclusion of law is the basis upon which the trial court made its determination that the counterclaims of Intraspace should be dismissed.

There is no support for this conclusion either in the law or in these facts. The written contract between Intraspace and Execusoft clearly provided that the product developed would belong to Intraspace. No where in the written agreement between the

parties is it stated that the product developed by the computer programmers did not belong to Intraspace, or need not be delivered to Intraspace, if the appropriate payments were not made. There is no basis for finding that the contract between the parties contained such a condition precedent. Accordingly, the trial court was completely erroneous when it ruled, as a matter of law, that there was no obligation to return the source code or the IAC8 unless payment was made.

Further, there is no support in the evidence for the finding of the court on the issue of mitigation. At paragraph 71 of the Findings of Fact, the court states:

> Even assuming Defendant was entitled to damages, there is no evidence of any attempt to mitigate. That could have been done by trying to return to Norway to work on the program, to try to get other methods to debug the program and as a last resort, when filing this action, a request for replivin of the source code and the IAC8. None of the above was ever done.

(R. 488).

The problem with this finding is that it is absolutely unsupported in the record. It was the burden of Execusoft to show, by competent evidence, exactly what steps should have been taken by Intraspace and how those actions would have lessened the damages caused by the failure to return the source code and IAC8. The record holds no such evidence. The mitigation ruling of the trial court must fail.

The specific relief sought by Intraspace is either the entry of a judgment in accordance with the counterclaim or, remand for a new trial on the issue of the damages raised by the counterclaim.

. . .

. . .

. . .

ARGUMENT

Point I

THE TRIAL COURT ERRED IN DISMISSING THE COUNTERCLAIMS AS A MATTER OF LAW

The facts of this matter, as they relate to this issue, are clearly understood and undisputed. Intraspace hired Execusoft to provide computer programmers for the specific purpose of performing a contract with the RNAF. Under this contract, Intraspace had the responsibility to develop a computer system that would assist the RNAF in its air traffic control functions. To meet the needs of Intraspace and the contract, Execusoft hired two programmers: Tim and Sue. There is no dispute that Tim and Sue rendered the services required by Intraspace and developed the computer program requested by the Norwegians.

There is also no dispute that the "product" which Tim and Sue developed for Intraspace was a source code. The source code is, in essence, the manual necessary to utilize the computer program. Without the source code, the computer program cannot be effectively utilized, debugged, amended or otherwise properly managed.

There is also no dispute that a piece of computer equipment, called an IAC8, was required in order for Tim and Sue to effectively do their work. Intraspace obtained that computer equipment on a loan basis, and is required to return it.

Finally, there is absolutely no dispute that both the source code, in its final form, and the IAC8, were in the possession of Tim and Sue when the work was completed in Norway. Both the source code and the IAC8 are still in the possession of Tim and Sue, having never been delivered to Intraspace, despite repeated demands.

Intraspace does not, by this appeal, dispute the conclusion of the court finding that Intraspace owed Execusoft money for the programming services rendered by Tim and Sue. However, Intraspace contends that the failure to return the source code and the IAC8 were, themselves, breaches of the agreement. There is undisputed testimony that the value of the source code is $250,000. (R.909). There is undisputed testimony that the value of the IAC8 is $3,600. (R.912).

The trial court erred in ruling that the counterclaims of Intraspace had no merit and should be dismissed. If a contract existed between these parties, that contract was enforceable by both parties. If Execusoft was entitled to the payment of monies (Intraspace's compliance) then Intraspace was entitled to a return of the source code and the IAC8 (Execusoft's compliance).

A. Execusoft Clearly Breached the Agreement by Failing to Return the Source Code and the IAC8.

It is a matter of black-letter law that the courts are to enforce the terms of agreements between parties. In this case, the court found that an agreement existed between Execusoft and Intraspace, but failed to impose the obligations of the contract on both parties.

There was a written contract signed by the parties. (Exh.2; R.216). The document is a standard, pre-printed form used by Execusoft. On the first page of the contract the parties agreed to the rates to be paid. On the second page, the parties agreed as follows:

> Each further agrees that all materials and products developed by EXECUSOFT under this agreement, shall be property of Client unless otherwise agreed in writing.

(R.217).

In this case, the client was Intraspace and the product was the source code. No where in the agreement does it state or imply that the product does not belong to the client if payment is not made. No where does it state that the product can be withheld for non-payment. The court failed to rule that the refusal of Execusoft to return to source code, as well as the IAC8, was, in itself, a breach of the agreement.

In effect, the trial court ruled that the contract between the parties contained a condition precedent. The condition that the court implied was that Execusoft had no obligation to turn over to Intraspace the source code and the IAC8 unless and until Execusoft had been paid. (R.490). This ruling is not supported by law or fact.

It is well-settled in the law that conditions precedent are not favored and will not be read into a contract by implication. *Cheyenne Dodge, Inc. v. Reynolds and Reynolds Co.*, 613 P.2d 1234 (Wyo.1980). For example, in *Valley National Bank of Arizona v. Cotton Growers Hail Insurance, Inc.*, 747 P.2d 1225 (Ariz.App.1987), the court enunciated what is a standard rule of contractual construction:

> As a general rule, a contractual provision shall not be construed as a condition precedent unless the language of the provision plainly and unambiguously requires that construction.

Id. at 1227.

More specifically, in *Kimball v. Campbell*, 699 P.2d 714 (Utah 1985), the Utah Supreme Court stated:

> Whether a promise is conditional depends upon the parties' intent that is derived from "a fair and reasonable construction of the language used in light of all the circumstances when [the parties] executed the contract.

Id. at 716. Following this reasoning, the courts have consistently struck down attempts to make payment on a clearly separate portion of a contract, a condition precedent to compliance with another, separate, portion of the contract. See, e.g., *Pasker Gould & Weaver, Inc. v. Morse*, 887 P.2d 872 (Utah App.1984) (non-payment of architect's contract on first phase not condition precedent to payment on second phase).

In the case at hand, the contract between the parties is unambiguous. Execusoft was to provide programming assistance. Any and all work product developed by the programmers clearly, by the written declaration of the contract, belonged to Intraspace. It was clearly understood by all parties that the work product belonged to Intraspace.

Mr. David Thomas, President of Execusoft, admitted freely that Intraspace was the proper party to sell the source code to the Norwegians. (R.664). In meetings in which payments were discussed, Mr. Thomas did not dispute the fact that the source code belonged to Intraspace. (R.664). Moreover, when Mr. Thomas determined to sell the source code directly to the Norwegians, he thought it necessary to have Intraspace relinquish its ownership of the source code. (Exh.18; R.288). Clearly, if payment was a condition precedent to ownership of the source code, such relinquishment would not have been necessary.

In this contract, each party had an obligation, neither of which was a condition of the other. Intraspace was to pay for services rendered. The trial court has ruled that Intraspace breached and has entered judgment accordingly. By the same token, Execusoft was to deliver the source code and the IAC8, which it has never done. Intraspace is clearly entitled to a similar finding of breach and damages.

B. The Appropriate Damages for Execusoft's Breach of Contract is Uncontested.

Because the counterclaims of Intraspace were dismissed, the trial court failed to assess the damages that accrue from Execusoft's breach, i.e., its failure to return to Intraspace the source code and the IAC8. At trial, Tim and Sue freely testified that the source code was an important product, without which the computer software program for which the Norwegians paid, was of little use. (R.731, 765). Tim testified that he had the latest version of the source code with him when he left Norway, when the work was finished. (R.765). He stated that he had not given the source code to Execusoft or to Intraspace but that he had "buried" the source code in the program that he left in Norway. (R.765). He was free to admit that, in essence the source code was encrypted and that the Norwegians would not be able to get to it without a great deal of difficulty.

Intraspace recognizes that testimony was given regarding the ability of Intraspace to sell the source code to other users including other military users. Intraspace does not attack the finding that this evidence was too speculative to provide the foundation for a damage award. However, the evidence as to the value of the source code was not speculative, but was clear and direct.

Evidence was presented that the value of the IAC8 was $3,600.00. That evidence came in the form of testimony from Mr. Frank Williams who stated that the price list from General Dynamics, the manufacturer of this item, showed its value to be $3,600.00. (R.912). No testimony was offered by Execusoft to refute this statement.

In addition, there was specific testimony from Mr. Frank Williams regarding the value of the source code to Intraspace. Mr. Williams was the programmer in charge of

the entire project from beginning to end. He was completely and intimately familiar with the effort which went into development of the source code and into the completion of the contract with the Norwegians. He is also a computer programmer himself.

Mr. Williams testified that Intraspace was still under obligation to "warrant" its work and that there were still "bugs" in the system. (R.907-8). Mr. Williams was asked what it would cost to recreate the source code as follows:

> Q And are you familiar with what it is going to take to fix the bugs in the systems?
> A Approximately, yes.
> Q Assume for me, Mr. Williams, that you don't have the source code – and you don't have the source code right now, correct?
> A The last version of the source code, yes, we do not have it.
> Q Assume that you had to go back and fix the problems for the Norwegians debugging the systems without the source code. Have you made an estimate as to what it would take to do that, what kind of man hours or what kind of cost would it take to do that?
> A Yes
> Q And approximately what do you anticipate it would take, assuming that you don't have the source code to fix these problems?
> A Assuming that we don't have Tim and Sue to work on the project and assuming that we don't have the source, last version of the source code, and we no longer have access to the tests set up that had at this time frame, the '94 time frame, we have to go back to Norway for approximately 3-9 months.
> Q And have you made an estimate what the cost to Intraspace would be to undertake this effort and fix the problems with the Norwegians without the source code?
> A Yes
> Q And what is that?
> A $250,000-350,000.

(R.908-9).

Similar testimony was given by Mr. Robert D'Ausilio, President of Intraspace. When asked his opinion as to the value of the source code, Mr. D'Ausilio stated it to be $140,000.00 (R.1031).

Neither Execusoft, Tim or Sue ever disputed the testimony or presented testimony to contravene that number. Accordingly, the only testimony on the record is that of Mr. Williams and Mr. D'Ausilio. The court need not speculate as to the value of the product that Execusoft had failed to return to Intraspace.

As this court is aware, contract damages are awarded in order to "place the non-breaching party in as good a position as if the contract had been performed." *Alexander v. Brown*, 646 P.2d 692, 695 (Utah 1982). See also *Anesthesiologists Associates of Ogden v. St. Benedict's Hospital*, 852 P.2d 1030, 1039 (Utah 1993). Since Execusoft had clearly breached its part of the contract by failing to return the product to Intraspace, Intraspace was entitled to judgment for the undisputed value of the things that were lost. The decision of the trial court on the dismissal of the counterclaims should be reversed and remanded with instructions to enter judgment in favor of Intraspace in accordance with the evidence presented.

Point II

THE TRIAL COURT ERRED IN RULING THAT INTRASPACE HAD FAILED TO MITIGATE ITS DAMAGES

At paragraph 9 of the conclusions of law (R. 490), the trial court ruled, as a matter of law: "Defendant is required to mitigate damages." The particular finding of fact in question is found at paragraph 71 of the Findings of Fact (R. 488) wherein the trial court stated:

> Even assuming Defendant was entitled to damages, there is no evidence of any attempt to mitigate. That could have been done by trying to return to Norway to work on the program, to try to get other methods to debug the program and as a last resort, when filing this action, a request for replivin of the source code and the IAC8. None of the above was ever done.

In considering and ruling upon this issue of mitigation, the trial court misperceives the state of the evidence and the burden which the parties have to raise the issue of mitigation.

The law relative to mitigation is set forth in a number of cases. Most notably, in the case of *Angelos v. First Interstate Bank of Utah*, 671 P.2d 772 (Utah 1983) the Utah Supreme Court enunciated the principal as follows:

> The doctrine of avoidable consequences, also referred to as mitigation of damages, generally operates to prevent one against whom a wrong has been committed from recovering any item of damage arising from the wrongful conduct which could have been avoided or minimized by reasonable means. [Citations omitted.]

Id. at 777.

In this case, as it regards the counterclaims, Intraspace had the burden to show that the contract was breached and that it was entitled to damages. However, on the issue of mitigation of damages, the burden shifts to Execusoft. The fatal flaw in the case at hand is that Execusoft, at no time, presented sufficient evidence upon which the trial court could determine that there were other reasonable efforts which Intraspace could have undertaken to reduce the damage which it experienced from the failure of Execusoft to return the source code and the IAC8.

The law is very clear. Not only must there be reasonable measures available to the party claiming breach, but the party asserting the mitigation must produce competent evidence of those reasonable measures.

In *John Call Engineering, Inc. v. Manti City*, 795 P.2d 678 (Utah App.1990), this Court addressed these very issues. The Court first noted that in an action for damages for

breach of contract, the amount of damages otherwise recoverable by Plaintiff could be reduced if Plaintiff succeeded in mitigating its damages or if it failed to properly mitigate its damages. *Id.* at 680. This Court then stated in clear and unmistakable terms:

> However, the burden of proving Plaintiff has not mitigated its damages, and that its award should be correspondingly reduced is on the Defendant. "The Plaintiff has the burden of showing the contract breach and his damages, while, as a rule, the Defendant has the burden of proving that damages shown could have been minimized."

Id. at 680. This court further emphasized the point quoting from *Comfort Homes, Inc. v. Peterson*, 549 P.2d 107 (Colo.App.1976):

> It is not a Plaintiff's burden to produce the evidence on which any reduction of damages is to be predicated.

Id. at 680.

Finally, in ruling that the issue of mitigation of damages was not properly before the trial court, and therefore not properly before the Court of Appeals, the Court, in *John Call*, stated that there was no competent evidence upon which a ruling as to mitigation could be based:

> In order to submit the issue [of mitigation] to the jury, there must be competent evidence to show that the Plaintiff failed to take reasonable efforts to mitigate his damages. [Citations omitted]. In this case, Manti did not offer any evidence, through its own witnesses or on cross-examination, which would have allowed the court to submit the issue to the jury.

Id. at 680-81.

We have an identical situation in the case at hand. The court held in paragraph 71 of the findings of fact (R.488) that Intraspace could have done such things as trying "to return to Norway to work on the program", trying "to get other methods to debug the program" and making "a request for replevin of the source code." There is absolutely no

evidence presented by Execusoft that these were reasonable alternatives or that these alternatives could have resulted in less damage to Intraspace.

Intraspace recognizes its obligation, in this regard, to martial all of the evidence in favor of the findings of fact and then demonstrate that even when reviewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings. *Reed v. Reed*, 806 P.2d 1182 (Utah 1991). All that can be said is that the record is devoid of testimony from either the Plaintiff's witnesses or the Defendant's witnesses as to what reasonable steps could and should have been taken to minimize the damages resulting from the failure of Execusoft to return the source code and the IAC8. This dearth of testimony and evidence is the direct result of the belief of Execusoft that it had no obligation to return the source code or the IAC8.

In addition, one is hard pressed to believe that any such evidence as to mitigative efforts exists. What could Intraspace have possibly done to prevent its loss of approximately $250,000 for the source code other than to receive the source code? What could Intraspace have done to minimize its damages for the loss of the IAC8 other than to go buy another IAC8 at the value testified by the witnesses?

In short, the burden was on Execusoft to show what mitigation efforts Intraspace should have engaged in. There is no evidence of those suggested efforts in the testimony. Intraspace cannot martial the evidence in favor of mitigation as no such evidence exists. Accordingly, the finding of the court relative to mitigation is unfounded and should be reversed.

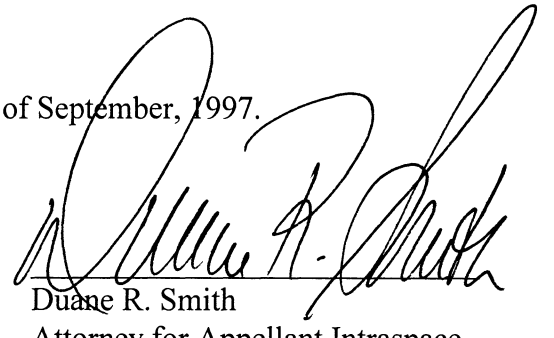
. . .

. . .

CONCLUSION

Intraspace seeks nothing more than equal treatment under the law. If there was a contract, that contract was enforceable as to all its terms. Under the contract, Execusoft, the Court ruled, was entitled to be paid for its work. Under that same contract, then, Intraspace was entitled to receive the source code and the IAC8. Execusoft did not receive payment and was therefore entitled to a judgment. Intraspace did not receive the IAC8 or the source code and was therefore entitled to a judgment. There is no basis for another ruling. This matter should be remanded with instructions to enter judgment in favor of Intraspace.

Respectfully submitted this 8th day of September, 1997.



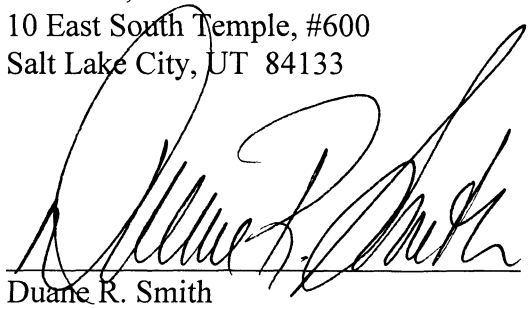
Duane R. Smith
Attorney for Appellant Intraspace

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 1997, two (2) true and correct copies of the foregoing BRIEF OF APPELLANT was served, postage prepaid and sent via U.S. Mail, to the following:

Stephen B. Elggren
ELGGREN & VAN DYKE
2469 East Fort Union Blvd., #202
Salt Lake City, UT 84121

Harry Caston
MCKAY, BURTON & THURMAN
10 East South Temple, #600
Salt Lake City, UT 84133



Duane R. Smith